IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 619

THE MASON & DIXON LINES, INC.
Petitioner

v.

GENERAL ELECTRIC COMPANY
Respondent

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## PETITIONER'S REPLY BRIEF


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## PETITIONER'S REPLY BRIEF

Respondent, General Electric, has asked this Court to dismiss Mason & Dixon's petition for certiorari, on three grounds:

(1) That General Electric was plainly entitled to indemnity because the key to the case is "who had the duty to brace" (Brief in Opposition, p. 6) and the record is clear that this duty fell solely upon Mason & Dixon, the motor carrier.

(2) That Mason & Dixon is now raising the question of its right to a jury trial for the first time.

(3) That the instant case presents no conflict with any prior decisions of this Court or the Circuits.

Each of Respondent's arguments will be considered in turn.

## POINT I

Petitioner, Mason & Dixon, respectfully submits that General Electric, by its own position, concedes the correctness of Petitioner's contention that the instant decision is wrong and should be reviewed and reversed by this Court.

General Electric is apparently willing to stand or fall in this case on its oft-repeated claim that it, the shipper of the bulky goods, had no obligation either to load or brace the equipment on the Mason & Dixon truck.

Such a position ignores:

(1) The fact that the *sole* basis for recovery of the injured driver, Moretz, in the main case was the breach of a duty upon General Electric to load and brace the equipment.

(2) The fact that the written provisions of Rules 21 and 22 of the published tariff of Southern Motor Carriers, filed with the Interstate Commerce Commission, required General Electric to load and brace the goods.

(3) The opinion of the Fourth Circuit that " . . . the provisions of the tariff formed part of the contract between the shipper and the carrier in this case." (270 F. 2d 780 at 787)

(4) The fact that General Electric's own expert witness, Behme, who attempted to interpret the tariffs, testified:

> "Q. Was Rule 22 ever intended to shift the responsibility for bracing from the common carrier to the shipper?
>
> "A. You use the term responsibility for bracing. It states it is the shipper's responsibility to brace. It says it must be furnished and installed by the shipper." (R. p. 170)

Clearly, the original and primary duty to load and brace, *as between General Electric and Mason & Dixon*, lay with the shipper, General Electric. It is equally clear from the jury verdict below that General Electric breached that duty.

Thus, it is believed that General Electric's statement of the main issue involved in the instant case begs the question. Petitioner submits that the real issue in the instant case is the consequence of General Electric's admitted breach of duty to Mason & Dixon, not the existence of the duty itself. There is also the critical correlative question of whether, under *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, 78 S. Ct. 438, 2L. ed 2d 491 (1958), the court or jury should determine the consequence of General Electric's breach in an action for indemnity.

## POINT II

Respondent's contention that Mason & Dixon is here raising for the first time the question of its right to a jury trial and has, in effect, waived the same is not correct.

First of all, it is clear that the Fourth Circuit Court of Appeals expressly ruled on this aspect of the case in rejecting Petitioner's request for a rehearing (see Appendix B

of Petition for Certiorari). And it is well established that questions passed on by a Circuit Court of Appeals will be considered by this Court on certiorari even though such questions were not raised in the trial court (*Friend* v. *Talcott*, 228 U. S. 27, 33 S. Ct. 505, 57 L. ed. 718 (1913) ).

Respondent has also overlooked the fact that Petitioner requested a jury trial on the question of indemnity both in the trial court and before the Fourth Circuit Court of Appeals. In the trial court (R. pp. 36-37), Petitioner requested the Court to submit General Electric's third-party action to the jury on interrogatories. Also, in its brief to the Fourth Circuit Court of Appeals, Petitioner argued:

> "*Weyerhaeuser, supra*, held that a shipowner had a right to a jury trial on the questions involving indemnity. Surely, there was no jury trial in the instant case on any issues of indemnity . . .
>
> "Should this court find that indemnity should not be denied to General Electric as a matter of law, the court would at the very best seem to be required to return this case for a proper jury trial on the indemnity issues." (Pp. 21-22 of Petitioners' brief to the Fourth Circuit Court of Appeals.)

Obviously, therefore, the question of Petitioners' right to a jury trial is properly before this Court for its consideration.

## POINT III

A. Respondent argues that *Hagans* v. *Farrell Lines*, 237 F. 2d 477 (3rd Cir. 1956) is not in conflict with the opinion of the Fourth Circuit Court of Appeals in the instant case. But such a contention ignores the fact that the express holding of *Hagans* was:

"Where the parties have violated similar duties to the injured person, neither is entitled to relief against the other." (237 F. 2d 477 at 482.)

And:

". . . in the face of mutual violations, Farrell [the party seeking indemnity] is not entitled to full indemnity, and, of course, it cannot have contribution." (237 F. 2d 477 at 483.)

In the instant case, however, the Fourth Circuit Court of Appeals concluded that General Electric, despite its admitted breach of contract, was entitled to full indemnity (*General Electric Compnay* v. *Moretz*, 270 F. 2d 780 (4th Cir. 1959) ). Nothing could be more obvious than the fact that the Third and Fourth Circuit Courts of Appeals have rendered divergent and contradictory decisions on the ultimate question presented by this case.

B. Petitioner also submits as significant that Respondent's Brief in Opposition does not in any way take issue with one of the two points presented in the Petition for Certiorari; Respondent does not deny Petitioners' allegation that this case, as it presently stands, holds that I. C. C. safety regulations (designed for the protection of the public) supersede the contractual obligation to load and brace heavy or bulk articles established by Rules 21 and 22 of the published Tariff of the Southern Motor Carriers on file with the I. C. C.

Petitioner, therefore, reiterates its position that the significant interpretation and application of 49 C. F. R. 192.9 (a) (b) and 193.9 (a) (b) by the Fourth Circuit Court of Appeals in the instant case merits review and clarification by this Court.

C. Respondent characterizes the instant case as "simply a common law negligence action" (Brief in

Opposition, p. 11) of little legal significance. This case, however, is not before this Court as a common law negligence action. It is before this Court as an action for implied indemnity, wherein the Fourth Circuit Court of Appeals, in the first instance, held that Respondent possessed a cause of action for implied indemnity, and then awarded indemnity without benefit of a jury and contrary to the mandate in *Weyerhaeuser, supra*. (See Petition for Certiorari, pp. 7-10).

D. Reference is made in the Petition for Certiorari (p. 13) to the case of *General Electric Company* v. *Irvin and The Mason & Dixon Lines* (Civil Action No. 1275, E. D. Tenn., October 9, 1958) then pending on appeal before the Sixth Circuit Court of Appeals (Docket No. 13,798). The decision in that case was announced by the Sixth Circuit on January 13, 1960 (though it is yet unreported). The district court opinion dismissing General Electric's third-party action for indemnity was affirmed. Though the Sixth Circuit Court of Appeals affirmed on another ground, it recognized the important questions presented by the instant case and left in full force and effect a district court holding that denied indemnity in a factual context identical in all essential respects to this decision.

In light of the important conflict of decisions which *General Electric Company* v. *Irvin and The Mason & Dixon Lines, Inc.* permits to stand, Petitioner respectfully submits that the urgent necessity for clarification of the concepts of implied indemnity are now even more urgently needed by Bench and Bar.

## CONCLUSION

In view of the foregoing, Petitioner respectfully renews its request that a writ of certiorari be granted in the instant case.

Respectfully submitted,

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